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No. 80-2033

In the Supreme Court of the United States

OCTOBER TERM, 1980

CARLOS ROMERO-BARCELO, GOVERNOR OF PUERTO RICO, ET AL., PETITIONERS

v.

CASPAR M. WEINBERGER, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Governor of Puerto Rico may obtain judicial review of his claim that the Navy has failed to comply with provisions of Military Construction Authorization Acts.

2. Whether the Noise Control Act of 1972 grants consent to a suit seeking to enjoin the use of federal government facilities under a state criminal nuisance statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 643 F.2d 835. The opinion of the district court (Pet. App. 57a-178a) is reported at 478 F.Supp. 646.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1981 (Pet. App. 55a-56a). A timely

petition for rehearing was denied on February 27, 1981 (Pet. App. 179a). The petition for a writ of certiorari was filed on May 28, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns the Navy's use of part of Vieques Island, Puerto Rico, as a range for air-to-ground, naval gunfire support and amphibious weapons training. The island, located off the southeast coast of Puerto Rico, is approximately 20 miles long and has an average width of 4 miles. It consists of approximately 33,000 acres, of which the United States owns more than 25,000 acres. (Pet. App. 2a-3a.) Portions of the eastern end of the island are used by the Navy for weapons training (Pet. App. 6a-7a).

The weapons training areas on Vieques are part of a larger complex known as the Atlantic Fleet Weapons Training Facility, headquartered at Roosevelt Roads Naval Station in Ceiba, Puerto Rico. This complex consists of four ranges: (1) the outer range, a large area of ocean lying to the north and south of Vieques,[1] (2) the underwater range, located off the western shore of St. Croix, (3) the electronic warfare range consisting of a series of threat simulator platforms located on Puerto Rico, Vieques and other neighboring islands, and (4) the inner range. (Pet. App. 5a-6a.) Prior to 1975, the inner range consisted of naval gunfire, bomb and missile targets on Culebra, an island located nine miles north of Vieques, as well as on Vieques (*ibid.*). In 1969, a suit was filed to modify or enjoin Navy use of

[1] At its closest points, the outer range is 35 miles north of Vieques, and 20 miles to the south.

Culebra. *Feliciano* v. *United States*, 297 F. Supp. 1356 (D.P.R. 1969), aff'd, 422 F.2d 943 (1st Cir. 1970). As the district court commented in this case: "The Navy won that legal battle but lost the political war that ensued, which culminated in the cessation in 1975 of all weapons training activities in Culebra Island" (Pet. App. 148a).

The Military Construction Authorization Acts of 1971 and 1972, Pub. L. No. 91-511, 84 Stat. 1204 *et seq.*, and Pub. L. No. 92-145, 85 Stat. 394 *et seq.*, contained provisions directing the Secretary of Defense to prepare reports concerning the use of, and alternatives to the Navy facilities on Culebra (Pet. App. 10a-12a). On submitting these reports to Congress, Secretary Laird recommended that the Navy retain its training targets on Culebra (*id.* at 12a).

Nevertheless, in 1973, the new Secretary of Defense, Elliot Richardson, concluded that it was in the Defense Department's long-range interest to transfer Culebra training activities to the islands of Desecheo and Monita in the Mona Passage.[2] This relocation was to occur only after Congress had appropriated the necessary funds and the Navy had reached "a satisfactory overall arrangement with the government of Puerto Rico * * * for insuring the long-term continuation of the Atlantic Fleet Weapons Range * * *" (Pet. App. 12a). Congress thereupon enacted the Military Construction Authorization Act of 1974, Pub. L. No. 93-166, 87 Stat. 661 *et seq.* Section 204(a) of the Act, 87 Stat. 668, authorized the appropriation of $12 million for the "construction and equipage of substitute facilities in support" of the relocation of

[2] The selection of these islands as the new site for the Culebra targets was overturned in 1974 due to the status of the Mona Passage as an international strait.

operations from the island of Culebra. Section 204(b) of the Act, 87 Stat. 668, however, expressly conditioned the relocation on the conclusion of an agreement between the Navy and Puerto Rico, which was to be "reported to the Committees on Armed Services of the Senate and the House of Representatives prior to execution of such agreement." The agreement was to include a provision committing the Commonwealth to make available lands "for the long term continued use of the Atlantic Fleet Weapons Range and Fleet Marine Forces training areas by the Navy, including, but not limited to, present areas and facilities on the island of Vieques" (*ibid*).

In 1974, although no relocation site had been selected and no agreement with Puerto Rico concluded, the Secretary of State informed the Secretary of Defense of the President's decision to terminate training activities on Culebra and its surrounding cays by the end of 1975 (Pet. App. 13a). This decision left the targets and facilities on Vieques as the sole components of the inner range (Pet. App. 6a). None of the $12 million appropriated pursuant to the Military Construction Authorization Act of 1974, was expended in improving the facilities on Vieques;[3] prior to this suit in 1978, negotiations continued between the Commonwealth and the Navy over the selection of a site to replace Culebra (Pet. App. 13a-14a).

The targets of Vieques consist of artillery targets, two bull's-eye targets for inert air-to-ground bombing practice, strafing targets, a series of mock targets of

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[3] In fact, in 1980 Congress, recognizing that the $12 million appropriation had never been spent, reallocated the amount to another Navy construction project in the Indian Ocean. Supplemental Appropriations and Rescission Act, Pub. L. No. 96-304, 94 Stat. 857 *et seq.* (see Pet. App. 14a n.10).

opportunity (*e.g.*, mock surface to air missile sites, fuel farm, ammunition dump and airstrip) for live air-to-ground bombing practice, and two remote controlled moving targets. There are also six naval gunfire targets. (Pet. App. 7a.)[4] These targets are all in the eastern portion of the island. The artillery targets, the bull's-eye inert bombing targets, and the strafing targets are located in an area known as the Surface Impact Area (SIA). The western boundary of the SIA is nine kilometers from the closest portion of the civilian occupied area of Vieques. (*Ibid.*) The remaining targets are located to the east of the SIA, in an area known as the Air Impact Area or Close Air Support Zone (AIA/CAS). The closest point of the civilian zone is about 13 kilometers from the border of AIA/CAS. The area between the civilian zone and the SIA is occasionally used for amphibious landing exercises; it is also leased to the local cattle association for grazing purposes. (See Pet. App. 6a-8a).

Air and sea operations in the inner range occur about 200 days a year, between the hours of 7:30 a.m. and 10:00 p.m. Aircraft training on the range are forbidden to fly over civilian areas, and ordinarily come no closer to such areas than five miles. Vessels shooting at targets in the AIA/CAS are positioned three to eleven miles south of the island. A danger zone in the sea surrounding Vieques, which prohibits civilian navigation in the area, is activated when the range is in use. (Pet. App. 7a-8a.)

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[4] All these targets were installed prior to 1975. The only improvements of the facilities on Vieques since 1975 were a television scoring system for the bull's-eye targets, installed in 1976, and ship positioning radar, installed in 1977. (Pet. App. 157a.)

2. On March 1, 1978, the Governor of Puerto Rico, Carlos Romero-Barcelo, and others initiated a suit seeking to enjoin continued use of the island for weapons training. The complaint charged the Navy with violations of almost every piece of major environmental legislation enacted by Congress in the last decade, including the National Environmental Policy Act of 1969, 42 U.S.C. (& Supp. III) 4321 *et seq.*; the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.*; the Clean Air Act Amendments of 1977, 42 U.S.C. (Supp. III) 7401 *et seq.*; the Noise Control Act of 1972, 42 U.S.C. 4901 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; the Endangered Species Act, 16 U.S.C. (& Supp. III) 1531 *et seq.*; the National Historic Preservation Act, 16 U.S.C. 470 *et seq.* (and Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971), *reprinted in* 16 U.S.C. 470 note, which implements that Act); the Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. 1361 *et seq.* In addition, the complaint claimed violations of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 *et seq.*, and various amendments to the United States Constitution. Finally, the complaint charged that the use of Vieques for weapons training violated the congressional and presidential directives concerning cessation of Navy operations on Culebra. (See Pet. App. 60a-61a.)

The district court held an extensive hearing on the merits of these allegations. The hearing on motions for a preliminary injunction, later consolidated as a hearing on the merits, lasted approximately 50 days and included testimony by dozens of lay and expert witnesses. The district court also made two site visits to Vieques to inspect the inner range and

the surrounding waters, and to witness noise-producing Navy activity. (Pet. App. 61a.)

On September 17, 1979, the district court issued a comprehensive decision and order (Pet. App. 57a-178a). The court found the Navy to be in violation of three environmental statutes and ordered curative action.[5] All other claims were dismissed. In particular, the district court held that the Navy was not in violation of the Noise Control Act of 1972, 42 U.S.C. 4901 *et seq.* It reasoned that the Puerto Rico nuisance statutes do not establish "requirements respecting control and abatement of environmental noise" within the meaning of the Noise Control Act, 42 U.S.C. 4903(b), because the Act contemplated federal compliance with specific standards, not a case-by-case inquiry concerning the reasonable use of property. (Pet. App. 109a-110a.) The district court also found (Pet. App. 110a) that "even under the most liberal interpretation of the Puerto Rican nuisance statute," the petitioners had failed to establish a nuisance as a factual matter (Pet. App. 110a-118a). It found that most of the sound in the civilian areas of Vieques comes from natural sources (biota—primarily tree frogs—rain and thunder) and the activities of the local residents (Pet. App. 115a). The court reviewed the evidence and concluded that the Navy activities—aircraft, bombing, and naval gunfire—added only an insignificant amount to the overall noise level on the

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[5] It found violations of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. (& Supp. III) 4321 *et seq.*; the Clean Water Act, 33 U.S.C. (& Supp. III) 1251 *et seq.*; and Exec. Order No. 11593, *supra*, which implemented the National Historic Preservation Act, 16 U.S.C. 470 *et seq.* See our petition in *Weinberger* v. *Romero-Barcelo*, No. 80-1990, at pages 3-4, for a further description of the district court's findings of violations.

island (Pet. App. 116a-117a). As a result, the court ruled that the claims under the Noise Control Act, "lack a basis in fact as well as law" (Pet. App. 118a).

The district court also dismissed the petitioners' claims that the Navy had violated congressional and presidential directives concerning the cessation of activities on Culebra by using the facilities on Vieques. After reviewing the history of the Culebra controversy, the court ruled that there was no Navy-Commonwealth agreement restricting use of Vieques (Pet. App. 153a-154a), that internal executive directives were not enforceable through the judicial system (Pet. App. 154a), and that the Authorization Acts did not grant "the Commonwealth a veto power over Naval operations in Vieques" (Pet. App. 156a). The district court further concluded that the level and content of training necessary for military readiness were political questions and nonjusticiable (Pet. App. 162a-165a).

3. On appeal, the court of appeals ruled that noise abatement requirements applicable to federal facilities under the Noise Control Act are limited to "relatively precise standards capable of uniform application to similar sources of sound" (Pet. App. 39a). It found no jurisdiction under the Noise Control Act, either express or implied, to enforce the Puerto Rico criminal nuisance statute against a federal facility (Pet. App. 40a).

The appellate court also ruled that a cause of action could not be implied in favor of the Commonwealth to enforce the provisions of the Military Construction Authorization Acts (Pet. App. 13a-17a). It held that the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, did not provide an alternative

source for the cause of action to enforce the Acts because the Navy use of Vieques did not constitute agency action within the meaning of the APA (Pet. App. 18a). Even if agency action were involved, moreover, the court ruled that it would be unreviewable as action "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2), because the statutes cited by the Commonwealth did not provide the judiciary with any law to apply (Pet. App. 19a).

ARGUMENT

So far as challenged by the present petition, the decision of the court of appeals is correct, does not conflict with any decision of this Court or any court of appeals, and does not warrant review by this Court.[6]

1. Petitioners contend that the court of appeals' decision is in conflict with numerous cases of this Court and of other courts of appeals because it found no "agency action", subject to the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, in the Navy's use of its training facilities on Vieques. The "agency action" in cases cited by petitioners include bringing a complaint against private business, *FTC* v. *Standard Oil Co. of California*, No. 79-900 (Dec. 15, 1980); revealing information supplied by private companies, *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979); and administrative interpretations of the application of

[6] The issues raised by petitioners are not related to the issue raised by the government's petition in *Weinberger* v. *Romero-Barcelo*, No. 80-1990. It is accordingly appropriate to consider the two petitions separately, even though they arise from the same case. Petitioners do not suggest otherwise, either in the instant petition or in their opposition in No. 80-1990.

statutes to private business, *Atlantic Richfield Co.* v. *Federal Energy Administration*, 556 F.2d 542 (Temp. Emer. Ct. App. 1977); *National Automatic Laundry & Cleaning Council* v. *Shultz*, 443 F.2d 689 (D.C. Cir. 1971). These actions bear little resemblance to an agency's continued use of its own property.[7] While the term "agency action" covers a "broad spectrum" of administrative actions, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967), it is not so broad that it includes every action of every federal employee. *International Engineering Co.* v. *Richardson*, 512 F.2d 573, 580 (D.C. Cir. 1975), cert. denied, 423 U.S. 1048 (1976). As the court of appeals noted (Pet. App. 18a), the statute defines "agency action" in terms that fundamentally involve administrative adjudication or rulemaking. The claimed "agency action" in this case does not remotely involve either of these administrative functions.[8]

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[7] Petitioners claim (Pet. 8-9) that the availability in this case of APA review under the National Environmental Policy Act and the National Historic Preservation Act contradicts the court's interpretation of "agency action." But the court of appeals did not consider any issue arising under NEPA, and only an NHPA issue involving a duty to locate historic sites under Exec. Order No. 11593, 36 Fed. Reg. 8921 (1971). This duty was triggered by the Navy's ownership and control of the land; it was not based upon the existence of any proposed "agency action".

[8] Petitioners also suggest (Pet. 8) that the Navy's use of target facilities in Vieques constitutes an "order" within the meaning of the APA, 5 U.S.C. 551(13). The term "order," however, is more fully defined in 5 U.S.C. 551(6), as:

> [T]he whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing.

In any event, the court of appeals ruled that, even if "agency action" were present, judicial review under the APA would be precluded by the exception in 5 U.S.C. 701(a)(2) for action committed to agency discretion by law (Pet. App. 18a-19a). Navy use of the target facilities on Vieques is authorized by 10 U.S.C. 5012, which directs the Navy to organize, train and equip a combat-ready fleet and naval aviation forces.[9] In general, military decisions concerning training and the use of facilities are political questions, ones that are committed to agency discretion by law. See *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94 (1953); *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973). The level and type of training necessary to preserve the national security is not easily susceptible to judicial determination. *Rostker* v. *Goldberg*, No. 80-251 (June 25, 1981), slip op. 7. The court of appeals reviewed the Military Construction Authorization Acts invoked by petitioners and found in them no limitation on Navy discretion that could be applied to restrict the service's use of its target facilities on Vieques (Pet. App. 19a). For this reason, it ruled that the petitioners had no cause of action under the APA for lack of "law to apply" (*ibid.*).

Petitioners also contend that the court of appeals impermissibly meshed the tests for implication of the cause of action to enforce a statute and for the availability of judicial review of agency action under the APA (Pet. 9-12). The court's rejection of a cause of action under both theories, however, reflects not a merging of these two forms of action, but the content of the statutes upon which the petitioners rest their claims. As explained above, the court exam-

[9] See also 10 U.S.C. 5013, which provides for the organization, training and equipping of the Marine Corps.

ined the cited Military Construction Authorization Acts and found no limitation in them enforceable in an action under the APA to restrain the Navy's discretion to conduct necessary military training. The court also scrutinized these statutes to determine whether Congress intended to benefit petitioners, and to make that benefit enforceable through the courts (Pet. App. 13a-16a). On the basis of that scrutiny, the court found that the statutes were intended to safeguard the interests of the Navy rather than those of the Commonwealth of Puerto Rico (Pet. App. 14a). As a result, it held that no cause of action could be implied in favor of petitioners. See *Cort* v. *Ash*, 422 U.S. 66, 78 (1975); *California* v. *Sierra Club*, No. 79-1252 (Apr. 28, 1981).

2. Contrary to petitioners' suggestion (Pet. 15), the court of appeals' ruling concerning judicial enforcement of the federal facilities compliance provision of the Noise Control Act of 1972, 42 U.S.C. 4903, does not create a conflict with decisions of other courts. The present case represents the only court of appeals decision considering these provisions of the Noise Control Act. Also, both the citizens' suit provision and the federal facilities compliance provision, 42 U.S.C. 4903 and 4911, differ substantially from the equivalent provisions of the Clean Air Act Amendments of 1977 and the Clean Water Act.[10] Accord-

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[10] As noted by the court of appeals, the citizens' suit provisions of the Noise Control Act authorize actions only to enforce certain federal noise limitations or standards and not suits to enforce the federal facilities compliance provision. 42 U.S.C. 4911(f) (Pet. App. 34a-38a). The citizens' suit provisions of the Clean Water Act, 33 U.S.C. (Supp. III) 1365, and the Clean Air Act Amendments of 1977, 42

ingly, the court of appeals' determination that the federal courts lacked jurisdiction to entertain petitioners' Noise Control Act claims does not necessarily create a conflict with decisions construing these other statutes.

More significantly, the source of the conflict petitioners assert is the court of appeals' failure to find an implied cause of action to enforce the Noise Control Act in the savings clause in the citizens' suit provision (Pet. 16-17). In *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*,

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U.S.C. (Supp. III) 7604, in contrast both specifically authorize suits to enforce the federal facilities compliance provisions of those Acts. See *Hancock* v. *Train*, 426 U.S. 167, 196 (1976).

The federal facilities compliance provision of the Noise Control Act of 1972, 42 U.S.C. 4903, was modeled on the original compliance provision of the Clean Air Amendments of 1970. Section 118 of the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1689. *A Legislative History of the Noise Control Act of 1972*, 93d Cong., 2d Sess. 40 (Comm. Print 1974) (remarks of Sen. Tunney). In *Hancock* v. *Train, supra*, this Court construed the original federal compliance provision of the Clean Air Amendments of 1970 to require federal compliance with state and local substantive standards regarding pollution, but held that it did not subject federal facilities to state procedural requirements or state jurisdiction. 426 U.S. at 198-199. See also *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200 (1976). Subsequent to *Hancock* v. *Train, supra*, Congress amended the federal facilities compliance provisions of the Clean Air Act Amendments of 1977 (42 U.S.C. (Supp. III 7418) and the Clean Water Act (33 U.S.C. (& Supp. III) 1323), to subject federal facilities to state procedure and jurisdiction. The compliance provision of the Noise Control Act of 1972, 42 U.S.C. 4903, however, was not amended. Therefore, questions relating to enforcement of the federal facilities compliance provision of the Noise Control Act are not identical to those concerning the Clean Air Act and the Clean Water Act, and comparison with cases dealing with the latter two Acts is not always warranted.

No. 79-1711 (June 25, 1981), slip op. 13, this Court ruled that an implied cause of action to enforce the provisions of the Clean Water Act cannot be derived from the savings clause of the citizens' suit provisions in that Act. As a result, the conflict postulated by petitioners no longer exists.

Petitioners' claim (Pet. 15) that the court of appeals' decision leaves the federal compliance provision in the Noise Control Act unenforceable is also without merit. The court held that the Puerto Rico criminal nuisance statute did not create noise requirements applicable to federal facilities within the meaning of the Noise Control Act (Pet. App. 39a-40a). The opinion, however, left open the possibility of enforcement of uniform standards limiting the allowable "intensity, duration and character of sounds" against federal defendants under the APA (Pet. App. 38a-39a). The appellate court's distinction between nuisance statutes and uniform noise limitations standards is well supported. Under the Puerto Rico nuisance law, a case-by-case determination of the reasonableness of the defendant's activities is required in order to maintain "a balance between the defendant's right to the free use of his property and the rights of others to comfortable enjoyment of life or property" (Pet. App. 40a). See *Casiano Sales* v. *Lozada Torres*, 91 P.R.R. 473 (1964); *Arcelay* v. *Sanchez Martinez*, 77 P.R.R. 782 (1955).

In any event, the petitioners' contention (Pet. 18) that the "noise created by the use of live ordnance is excessive and significantly intrudes upon the daily life of Vieques residents" was rejected on the facts by the district court. That court held a 50-day hearing in this case, visited the island, and heard extensive testimony on noise from both lay and expert witnesses. (See Pet. App. 61a.) It meticulously evaluated all this

evidence (Pet. App. 110a-118a) and concluded, "even under the most liberal interpretation of the Puerto Rican nuisance statute * * * [petitioners] have failed to establish facts attributable to Defendant Navy justifying a conclusion that it is generating noise and shock waves of such magnitude as to interfere with either the health or property of the civilian residents of Vieques" (Pet. App. 110a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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